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In The

# Supreme Court of the United States

October Term, 1974

No. 74-1611

In the Matter
of
FAS INTERNATIONAL, INC.,
*Debtor.*

UNITED STATES TRUST COMPANY OF NEW YORK,
*Petitioner,*

*—against—*

FAS INTERNATIONAL, INC.,
*Debtor-Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Sheldon Lowe
KRAUSE, HIRSCH & GROSS
*Attorney for Respondent*
41 East 42nd Street
New York, N.Y. 10017

*Of Counsel:*
Salvatore A. Adorno
John F. Scheffel
KRAUSE, HIRSCH & GROSS

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*Cases:*

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*Statutes:*

Trust Indenture Act of 1939

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Section 317; 15 U.S.C. §77qqq ..... 2, 4, A-3


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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent prays that Petitioner's petition for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 25, 1975, be denied.

### Opinions Below

The Court of Appeals affirmed without opinion the judgment of the District Court for the Southern District of New York. The decision of the Court of Appeals is reported at 511 F.2d 1164 (2d Cir. 1975). The opinion of the District Court

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is reported at 382 F. Supp. 77 (S.D.N.Y. 1974) and is printed in Appendix A of the petition herein. The opinion of the Bankruptcy Court below is not reported but is printed in Appendix B of the petition herein.

## Jurisdiction

The Respondent makes no challenge to the jurisdiction of this Court.

## Question Presented

The question presented for review is whether or not the Bankruptcy Court has the power and the authority to award compensation to an indenture trustee in a proceeding for an Arrangement pursuant to Chapter XI of the Bankruptcy Act, particularly where the indenture trustee's services only benefited debentureholders and did not benefit the estate, and in light of the fact that, in enacting the Bankruptcy Act as amended, Congress has excluded indenture trustees from the list of persons eligible for such compensation in Chapter XI proceedings.

## Statutes Involved

Respondent would add to the statutes cited by petitioner the following:

Those portions of Section 311 of the Trust Indenture Act of 1939 (15 U.S.C. §77kkk) reproduced as Appendix A hereof.

Those portions of Section 317 of the Trust Indenture Act of 1939 (15 U.S.C. §77qqq) reproduced as Appendix B hereof.

## Statement of the Case

Respondent agrees with petitioner's Statement of the Case, except:

1. The debentureholders were not disenfranchised as petitioner contends at Page 6 of the petition.

2. Respondent denies that "It was generally conceded. . . ."

that petitioner had raised valid questions about the scope and extent of the subordination of the debentures as petitioner asserts at Page 6 of the petition.

3. Respondent adds and emphasizes that the services rendered by petitioner were of benefit only to the subordinated debentureholders it represented and were of no benefit to the debtor's estate.

## ARGUMENT

Reasons for not granting the writ of certiorari prayed for are that the decisions below are entirely consistent with the provisions and intent of the Trust Indenture Act of 1939 as well as those of the Bankruptcy Act. In addition, as is pointed out in the District Court opinion and affirmed by the Court of Appeals, the question raised by the petitioner properly is a subject for legislative, not judicial, review.

### I

Petitioner argues that Indenture Trustees perform important services in Chapter XI arrangement proceedings, that they are required to do so by the terms of the Trust Indenture Act of 1939 and that Congress could not have intended that they perform such services without compensation.

Petitioner misses the point. The question is not whether indenture trustees perform useful services in Chapter XI arrangement proceedings or whether they are required to do so, nor is it whether indenture trustees should be compensated for performing such services. The question is: has the Bankruptcy Court the power and authority to authorize and require the debtor in a proceeding for an arrangement pursuant to Chapter XI of the Bankruptcy Act to pay an indenture trustee compensation and expenses as an expense of administration, particularly where the services rendered by the indenture trustee benefited only the debentureholders it represented and were of no benefit to the debtor's estate. The answer clearly is no.

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Petitioner cites certain sections of the Trust Indenture Act of 1939 to support the proposition that indenture trustees are required to perform certain services in Chapter XI proceedings and therefore are entitled to compensation.

Petitioner overlooks, however, Section 317 of the Trust Indenture Act of 1939, reproduced in part as Appendix B hereto, which expressly and without limitation authorizes debenture trustees to file proofs of claim on their behalf as well as on behalf of securities holders in any judicial proceeding. Petitioner also overlooks those provisions contained in Section 311 of the Trust Indenture Act of 1939, reproduced in part as Appendix A hereof, which *inter alia* provide an indenture trustee with a preferred status in collecting upon its claim against an obligor upon the obligor's failure to make full payment of principal or interest when and as the same becomes due. The same section provides at subsection (b)* that the Indenture may (but need not) exclude the indenture trustee's compensation and expenses from the operations of the provisions summarized above.

It has been noted, in the oral argument before the Court of Appeals, that the Indenture herein provided that FAS International, Inc. (FAS) would compensate the indenture trustee and pay its expenses. Further, it was suggested that the Trust Indenture was a contract entered into before FAS filed its petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act and that the indenture trustee's proper recourse in seeking compensation and expenses for carrying out its obligations pursuant to that contract was to file a proof of claim in the Chapter XI proceedings for an unliquidated amount as a general unsecured creditor. To do so would have been consistent with the Trust Indenture Act of 1939 as well as with Chapter XI of the Bankruptcy Act and the opinions below which petitioner would have this Court review. To do so also would have achieved an equitable result since the indenture trustee would have received shares of stock of the debtor corporation. The indenture trustee's "valuable" services to the debentureholders resulted in their receiving shares of stock of the debtor corporation – a benefit not accruing to the estate herein.

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* Appendix A at Page A-2.

## II

Petitioner argues in its petition, as it did in the courts below, that because Chapter X of the Bankruptcy Act expressly authorizes compensation of indenture trustees, as an expense of administration, the same treatment should be afforded in proceedings pursuant to Chapter XI of the Bankruptcy Act.[1] Chapter XI of the Bankruptcy Act excludes indenture trustees from the list of persons who are to receive such treatment just as purposefully as Chapter X includes them. Throughout numerous revisions of the Bankruptcy Act, Congress consistently has excluded indenture trustees from the list of those entitled to be compensated as an expense of administration in Chapter XI arrangement proceedings. Clearly, the courts below were correct in holding that it is the province of Congress, not the Courts, to write indenture trustees into the list of persons entitled to receive compensation and expenses as an expense of administration in Chapter XI proceedings.

## CONCLUSION

For the foregoing reasons, it is respectfully urged that the within petition for a writ of certiorari should be denied because petitioner has proffered no substantial reasons for granting such a writ.

Respectfully submitted,

Sheldon Lowe
KRAUSE, HIRSCH & GROSS
*Attorney for Respondent*
41 East 42nd Street
New York, N.Y. 10017

Of *Counsel:*
Salvatore A. Adorno
John F. Scheffel
KRAUSE, HIRSCH & GROSS

1. It should be noted that even in Chapter X proceedings Indenture Trustees are not entitled to receive compensation and expenses as an expense of administration when, as here, their activities benefit only the debentureholders and are of no benefit to the estate. *In re Prudence Bonds*, 122 F.2d 258 (C.C.A. 2d 1941); *In re Philadelphia & Reading Coal & Iron Co.*, 61 F. Supp. 120 (E.D.Pa., 1945).

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## Concurrence of Attorneys for Creditors Committee

Counsel for the official committee of creditors concurs with the debtor-respondent on its brief.

Michael Crames
LEVIN & WEINTRAUB
*Attorneys for creditors committee*
225 Broadway
New York, N.Y. 10007

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## APPENDIX A

Trust Indenture Act of 1939, Section 311 (15 U.S.C. §77 kkk)

Preferential collection of claims against obligor

(a) Subject to the provisions of subsection (b) of this section, the indenture to be qualified shall provide that if the indenture trustee shall be, or shall become, a creditor, directly or indirectly, secured or unsecured, of an obligor upon the indenture securities, within four months prior to a default as defined in the last paragraph of this subsection, or subsequent to such a default, then, unless and until such default shall be cured, such trustee shall set apart and hold in a special account for the benefit of the trustee individually and the indenture security holders –

(1) an amount equal to any and all reductions in the amount due and owing upon any claim as such creditor in respect of principal or interest, effected after the beginning of such four months' period and valid as against such obligor and its other creditors, except any such reduction resulting from the receipt or disposition of any property described in paragraph (2) of this subsection, or from the exercise of any right of set-off which the trustee could have exercised if a petition in bankruptcy had been filed by or against such obligor upon the date of such default; and

(2) all property received in respect of any claim as such creditor, either as security therefor, or in satisfaction or composition thereof, or otherwise, after the beginning of such four months' period, or an amount equal to the proceeds of any such property, if disposed of, subject, however, to the rights, if any, of such obligor and its other creditors in such property or such proceeds.

Nothing herein contained shall affect the right of the indenture trustee –

(A) to retain for its own account (i) payments made on account of any such claim by any person (other than such obligor) who is liable thereon, and (ii) the proceeds of the

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bona fide sale of any such claim by the trustee to a third person, and (iii) distributions made in cash, securities, or other property in respect of claims filed against such obligor in bankruptcy or receivership or in proceedings for reorganization pursuant to the Bankruptcy Act or applicable State law; . . .

(C) . . . As used in this paragraph, with respect to any claim, the term "dividends" shall include any distribution with respect to such claim, in bankruptcy or receivership or in proceedings for reorganization pursuant to the Bankruptcy Act or applicable State law, whether such distribution is made in cash, securities, or other property, but shall not include any such distribution with respect to the secured portion, if any, or such claim. The court in which such bankruptcy, receivership, or proceeding for reorganization is pending shall have jurisdiction (i) to apportion between the indenture trustee and the indenture security holders, in accordance with the provisions of this paragraph, the funds and property held in such special account and the proceeds thereof, or (ii) in lieu of such apportionment, in whole or in part, to give to the provisions of this paragraph due consideration in determining the fairness of the distributions to be made to the indenture trustee and the indenture security holders with respect to their respective claims, in which event it shall not be necessary to liquidate or to appraise the value of any securities or other property held in such special account or as security for any such claim, or to make a specific allocation of such distribution as between the secured and unsecured portions of such claims, or otherwise to apply the provisions of this paragraph as a mathematical formula. . . .

(b) The indenture to be qualified may contain provisions excluding from the operation of subsection (a) of this section a creditor relationship arising from – . . .

(3) disbursements made in the ordinary course of business in the capacity of trustee under an indenture, transfer agent, registrar, custodian, paying agent, fiscal agent or depositary, or other similar capacity;

(4) an indebtedness created as a result of services rendered. . . .

## APPENDIX B

Trust Indenture Act of 1939, Section 317 (15 U.S.C. §77 qqq)

Special powers of trustee; duties of paying agents

(a) The indenture to be qualified shall contain provisions — . . .

(2) authorizing such trustee to file such proofs of claim and other papers or documents as may be necessary or advisable in order to have the claims of such trustee and of the indenture security holders allowed in any judicial proceedings relative to the obligor upon the indenture securities, its creditors, or its property.

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